

**Letter of Findings Number: 09-0979
Sales and Use Tax
For Tax Years 2006-08**

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ISSUES

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); Sales Tax Information Bulletin 8, 25 Ind. Reg. 3934 (May 2002).

Taxpayer protests the imposition of use tax on several purchases it believes are not subject to tax.

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana retailer. As the result of an audit, the Indiana Department of Revenue ("Department") determined that for the tax years 2006, 2007, and 2008, Taxpayer had not paid sales tax on purchases which were subject to tax and had not collected sales tax on a small amount of sales it made as a retail merchant in 2006 and 2007. Therefore, the Department issued proposed assessments for use tax, sales tax, ten percent negligence penalties, and interest. Taxpayer protested a portion of the use tax assessments, as well as the imposition of negligence penalties. After filing its protest, Taxpayer was able to supply the auditor with additional documentation which established that Taxpayer had paid sales tax on seven purchases it made in 2006 and 2007 with a particular credit card. The Department agreed to remove those seven purchases from the audit list of taxable items. Taxpayer continues to protest two more categories of purchases, which the Department's audit determined were taxable, as well as the ten percent negligence penalties. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of use tax on two categories of purchases it made in the tax years 2006-08. The first category is the amount Taxpayer paid for access to an online service and the second category is the amount Taxpayer paid for advertising services. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. In this case, the Department determined that Taxpayer had acquired tangible personal property in retail transactions and used that property in Indiana without paying sales tax at the point of purchase. The Department therefore issued proposed assessments for use tax, as provided by [45 IAC 2.2-3-4](#).

At the time of the audit, due to personnel turnover and a change in business locations, Taxpayer was unable to provide documentation supporting its assertion that these were nontaxable purchases. As a result, the audit report included these items in its calculations of taxable purchases. In the course of the administrative hearing, Taxpayer was able to provide supporting documentation for its position that these were nontaxable purchases.

The first protested category involves access to an online service. Taxpayer is only protesting the \$1,095 monthly usage fee. Taxpayer is not protesting any additional amounts billed. Taxpayer refers to Sales Tax

Information Bulletin 8, 25 Ind. Reg. 3934 (May 2002) provides in relevant part:

The sale or lease of computer time through the use of a terminal or as a result of a batch service arrangement is a nontaxable service and is not subject to tax if separately billed or charged. However, any charges for computer machines and equipment (i.e., the terminal) remain subject to tax.

A review of the supplied documentation establishes that the \$1,095 monthly usage fee was for batch services. Taxpayer has therefore met its burden of proving that these payments were nontaxable.

The second protested category involves online advertising services. Taxpayer protests the \$165 monthly fee charged by this service from January 2006 through November 2006. Taxpayer is not protesting any other charges by this service. As part of the hearing process, Taxpayer was able to provide documentation establishing that the protested amounts paid to this particular company were for online advertising of Taxpayer's merchandise. The advertising consisted of a service and no tangible personal property was exchanged. Taxpayer has therefore met its burden of proving that the \$165 monthly fee was for nontaxable services.

In conclusion, Taxpayer has met its burden of proving that the \$1,095 monthly batch service fees are nontaxable. Taxpayer has also met its burden of proving that the \$165 monthly advertising fees from January 2006 through November 2006 were nontaxable. The Department will also remove the seven previously agreed to credit card charges from the audited amounts of taxable items.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration—Negligence Penalty.

DISCUSSION

The Department issued a proposed assessment and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty and interest on the items protested in Issue I above. The Department notes that it may not waive interest, as provided by IC § 6-8.1-10-1(e). The Department also refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(Emphasis added).

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer incurred assessments which the Department determined were due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to penalties under IC § 6-8.1-10-2.1(a). While Taxpayer has been sustained in its protests discussed in Issue I, the Department notes that several other taxed items remain. After review of the circumstances in this case, Taxpayer has not established that the remaining assessments arose due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2\(c\)](#). However, since Taxpayer was sustained on its protests of the items discussed in Issue I, the penalties and interest will be recalculated after those items are removed from the list of taxable purchases.

FINDING

Taxpayer's protest is sustained in part.

CONCLUSION

Taxpayer is sustained on Issue I regarding the imposition of use tax. Taxpayer is sustained on Issue II, to the extent that penalty and interest will be recalculated.

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